BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: EPSILON ELECTRONICS, INC. dba POWER ACOUSTIK ELECTRONICS 1550 S. MAPLE Avenue Montebello, CA 90640 Employer	Docket 09-R6D2-2325 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On December 31, 2008, the Division of Occupational Safety and Health (Division) opened an accident investigation at Epsilon Electronics Inc. dba Power Acoustic Electronics' (Employer's) business location. The Division issued eight citations, one of which alleged a violation Title 8, Cal. Code of Regulations section 342(a).[1] Employer timely appealed, and through a series of stipulations, the parties resolved all issues except the existence of the 342(a) violation, and the appropriate penalty in the event the violation was established. The parties stipulated, however, that the Employer failed to report, and that the injury sustained by the employee was serious. The ALJ concluded these facts established the violation, and determined a $4000. penalty was appropriate under the circumstances, applying the rationale and factors for penalty determination set forth in *Trader Dan's dba Rooms N Covers*, Cal OSHA App. 08-4978 Decision After Reconsideration (Oct. 8, 2008). The Board ordered reconsideration of the matter on its own motion regarding only the appropriateness of the penalty assessed for the alleged violation of section 342(a).[2]

[1] All references are to California Code of Regulations, Title 8, unless otherwise indicated.
[2] Employer did not answer the Order of Reconsideration. The Division did file an answer which we have considered.

EVIDENCE

The parties stipulated the injury that occurred was serious, a report was not made, and Employer was aware of the employee's treatment and the serious nature of the injury. Employer did not report the injury because it was unaware of the requirement to do so.

Additional evidence was entered in to the record by way of the Division inspector's testimony. The inspector opened her investigation three days after the injury.[3] At that time, the employee was yet unaware of the extent of his injuries. He was hospitalized for one week for a broken leg. Employer spoke to the injured employee about his injuries after the Division began its investigation. Employer was employee's secondary employer, and received information about the employee from the primary employer. The ALJ concluded Employer should have exercised reasonable diligence in trying to ascertain the seriousness of the injury, such as by making calls to the primary employer. As a result, the ALJ assessed a $4,000 penalty applying our rationale in *Trader Dan's, supra*.

ISSUE

What is the appropriate penalty for the 342(a) violation?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Section 342(a) states:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made longer than 24 hours after the incident . . .

[3] The emergency responder reported the injury under its separate duty to do so. (§ 342(b).)

The Division's penalty regulation pertaining to alleged section 342(a) violations is section 336(a)(6), which states "Any employer who fails to timely report an employee's injury or illness, or death, in violation of [section 342(a)], shall be assessed a minimum penalty of $5,000."

The statutory basis for both these regulations is Labor Code section 6409.1(b), which states:

> In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a) [lost-time workplace injuries reported within 5 days to Administrative Director of Division of Workers' Compensation], a report shall be made immediately by the employer to the Division of Occupational Safety and Health by telephone or telegraph. An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars ($5000). Nothing in this section shall be construed to increase the maximum civil penalty, pursuant to Sections 6427 to 6430, inclusive, that may be imposed for a violation of this section.[4]

In *Trader Dan's dba Rooms N Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009), the Board clarified the factors that could justify setting a penalty lower than that proposed by the Division. Here, the parties stipulated that the reason Employer failed to report was that it was unaware of its obligation to do so. Ignorance of the law is not a reason for non-compliance. (*Nick's Lighthouse*, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (Jun. 8, 2007).) Thus, the innocence of the error here is irrelevant to the penalty amount.

Rather, the Division's proposed penalty is before us to determine whether it is appropriate to affirm, modify, or vacate the proposed penalty, or direct other appropriate relief given the purposes of the Occupational Safety and Health Act (Act). (Labor Code sections 6602, 6300.) Labor Code section 6300 states:

> The California Occupational Safety and health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education

[4] We note the conflict between "may" in section 6409.1(b) and the use of "shall" in section 336(a)(6). When a statute and a regulation conflict, the statute controls. (*In re C.B.* (2010) 188 Cal.App.4th 1024, 1034.)

training and enforcement in the field of occupational safety and health.

To achieve this purpose, the Legislature enacted section 6409.1(b) in 2002 stating that in every case of an employer who fails to report, a penalty of not less than $5000 may be assessed. Section 6409.1(b) makes specific reference to some other penalty setting portions of the Act, specifically those setting forth the *maximum* allowable penalty assessment.

In *Allied Sales and Distribution,* Cal/OSHA App. 11-0408, Decision After Reconsideration (Nov. 29, 2012) and *SDCCD –Continuing Education N C Center*, Cal/OSHA App. 11-1196, Decision After reconsideration (Dec. 4, 2012), we reviewed the legislative history of the 2002 amendment of Labor Code section 6409.1(b) and found a clear intent to impose a $5000 penalty on employers who fail to report serious injuries, illness or deaths occurring in the workplace. With such a clear legislative intent behind the ambiguous language, the Board concluded the only way to fulfill the legislative intent of the enactment was to impose a $5000 penalty for every case of a failure to report, unless doing so would result in a miscarriage of justice. We clarified that a late report was not intended to carry a $5000 penalty in all cases, because such intent could not be discerned from the legislative history. The unique circumstances here, however, do not rise to the level of a miscarriage of justice upon the imposition of the $5000 penalty for this failure to report.

Employer was aware its employee was hospitalized for over 24 hours, and had suffered a broken leg. Long ago the Board cautioned that if there is a doubt as to the extent of an employee's injuries, the better course of action is to report the injury. (*Alpha Beta Company*, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979).) Employers who delay reports because they lack clarity on the extent of an employee's injuries may not be excused from the reporting obligation simply because the Division is diligent and investigates quickly, as occurred here. Were the Division to investigate before the time to report had expired, then requiring the report would be absurd. (*In re Marriage of Caldwell-Faso and Faso* (2011) 191 Cal.App.4th 945, 960.) Here, the time to report had expired and Employer had yet to attempt to comply. "Substantial compliance cannot be predicated on no compliance." (*City of San Jose v Superior Court* (1974) 12 Cal. 3d 447, 456.)

The legislature intended to punish this non-reporting behavior with a $5000 penalty. (*Allied Sales, supra; SDCCD –Continuing Ed N C Center, supra.*) We impose that penalty here in order to effectuate that legislative intent. Employer's appeal is denied, and the proposed penalty of $5000 is affirmed.

DECISION

The Decision in docket number 09-R6D2-2325 is affirmed insofar as the citation is affirmed, but the penalty imposed is hereby determined to be $5000.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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